TEOH AH MOOI A

v.

CAUSEWAY BAY PLANTATIONS SDN BHD

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: A-02(IM)-1119-05-2012]
27 AUGUST 2012 C

BANKRUPTCY: *Capacity of bankrupt - Sale of land by undischarged bankrupt - Claim for specific performance of sale and purchase agreement - Whether appellant has the capacity to deal with undivided shares - Official assignee not made a party - Official assignee not served with cause papers - Whether default judgment illegal and a nullity* D

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether default judgment a nullity - Whether application to set aside barred by limitation - Limitation Act 1953, s. 6(3)* E

This was an appeal which revolved around a claim for specific performance of a sale and purchase agreement ('S&P agreement') against 14 defendants. The appellant was named as the sixth defendant. The subject matter of the S&P agreement was a piece of land in the District of Kerian, Perak ('the said land'). The F
14 defendants including the appellant named in the action filed by the respondent were co-owners of the said land held by way of undivided shares. The appeal herein only concerns the default judgment obtained against the appellant, as the claim against the remaining defendants was disposed in favour of the defendants. G
Sometime, on a date before the execution of the S&P agreement, the appellant was adjudged a bankrupt. This was made known to the respondent *vide* letter dated 24 June 1994. Nonetheless, the respondent proceeded to file an action against the defendants for the specific performance of the S&P agreement for the sale of the H
said land. The respondent then obtained default judgment against the appellant, despite the fact that the appellant was not represented by solicitors. The cause papers had not been served on the official assignee. Furthermore, the appellant had been overseas before commencement of the action. It was the I

appellant's case that the default judgment was a nullity and therefore applied to set aside the default judgment. On 28 June 1999, the respondent obtained default judgment against the appellant. The application to set aside the default judgment was filed on 12 January 2012. Thus, it was argued by the respondent that the application by the appellants was barred by limitation, pursuant to s. 6(3) of the Limitation Act 1953 ('the Limitation Act').

Held (allowing appeal; setting aside default judgment)

Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The appellant was adjudicated a bankrupt on 8 January 1992 and remained a bankrupt when he executed the S&P agreement on 24 August 1995. The solicitors for the defendants duly informed the solicitors for the respondent of this fact and drew their lawyer's attention to cl. 17 of the agreement which provided that the S&P agreement was to determine upon any one of the parties to the agreement being adjudicated a bankrupt. (para 7)

(2) It is trite law that upon a person being adjudicated a bankrupt, the estate of the bankrupt vests in the official assignee. The net effect of the estate of the appellant being vested in the official assignee at the time of the execution of the S&P agreement was that the agreement was void as the appellant did not have the capacity to deal with his undivided shares in the said land by entering into the S&P agreement. (paras 8 & 9)

(3) The appellant's application to set aside the default judgment should be determined according to the principles of law set out by the Federal Court in the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (refd). The default judgment entered by the respondent against the appellant was clearly illegal and consequently a nullity because at the time of the execution of the S&P agreement, the appellant was incapable in law in dealing with his undivided shares in the said land, in which, the only person recognised by law as having the capacity to deal with the appellant's undivided shares was the official assignee. Further, the entry of the default judgment was against the principles of natural

justice since the official assignee was neither made a party to the action nor served with the cause papers leading to the entry of default judgment notwithstanding being the party recognised by law as the proper party to deal with the assets of the appellant arising from his status as a bankrupt. (paras 10 & 11)

(4) Section 6(3) of the Limitation Act governs the period of time within which a party is required by law to enforce judgment of the court. Where an order of court is a nullity, then, an application to set aside can be made any time. (para 12)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah satu rayuan yang berkisar tentang satu tuntutan untuk pelaksanaan spesifik perjanjian jual beli ('PJB') terhadap 14 defendan. Perayu telah dinamakan sebagai defendan keenam. Hal perkara PJB adalah mengenai sebidang tanah di Daerah Kerian, Perak ('tanah tersebut'). Defendan-defendan termasuk perayu yang dinamakan dalam tindakan yang difailkan oleh responden adalah pemilik bersama tanah tersebut melalui pegangan tak berbelahbagi. Rayuan di sini hanya berkaitan penghakiman ingkar yang diperolehi terhadap perayu, di mana tuntutan terhadap defendan-defendan yang selebihnya telah diputuskan memihak kepada defendan-defendan. Sekitar tarikh sebelum pelaksanaan PJB, perayu telah diisytiharkan sebagai seorang bankrap. Perkara ini telah dimaklumkan kepada responden melalui surat bertarikh 24 Jun 1994. Namun begitu, responden meneruskan untuk memfailkan satu tindakan terhadap defendan-defendan untuk pelaksanaan spesifik PJB bagi penjualan tanah tersebut. Responden kemudiannya mendapatkan penghakiman ingkar terhadap perayu, walaupun perayu tidak diwakili peguam. Kertas-kertas kausa juga tidak diserahkan kepada pemegang serah hak. Tambahan pula, perayu berada di luar negara sebelum bermulanya tindakan. Ia adalah kes perayu bahawa penghakiman ingkar adalah terbatal dan oleh itu, memohon untuk mengenepikan penghakiman ingkar. Pada 28 Jun 1999, responden mendapatkan penghakiman ingkar terhadap perayu. Permohonan untuk mengenepikan penghakiman ingkar difailkan pada 12 Januari 2012. Oleh itu, telah dihujahkan oleh responden bahawa permohonan oleh perayu telah terhalang oleh had masa di bawah s. 6(3) Akta Had Masa 1953 ('Akta Had Masa').

Diputuskan (membenarkan rayuan; mengenepikan penghakiman ingkar)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Perayu telah dihukum bankrap pada 8 Januari 1992 dan kekal sebagai seorang bankrap apabila memeterai PJB pada 24 Ogos 1995. Peguam untuk defendan-defendan memaklumkan peguam responden mengenai fakta ini dan membawa perhatian peguam mereka kepada kl. 17 perjanjian yang memperuntukkan bahawa PJB adalah untuk menentukan salah satu daripada pihak kepada perjanjian itu dihukum bankrap.

(2) Adalah undang-undang matan bahawa apabila seseorang dihukum bankrap, harta kepada orang yang bankrap terletakhak pada pemegang serah hak. Kesan utama harta perayu yang terletakhak kepada pemegang serah hak pada masa pemeteraian PJB adalah bahawa perjanjian tersebut adalah tidak sah memandangkan perayu tidak mempunyai kapasiti untuk menguruskan pegangan tak berbelahbagi di tanah tersebut dengan memasuki PJB.

(3) Permohonan perayu untuk mengenepikan penghakiman ingkar hendaklah ditentukan menurut prinsip undang-undang yang ditetapkan oleh Mahkamah Persekutuan di dalam kes *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* (dirujuk). Penghakiman ingkar yang telah dimasukkan oleh responden terhadap perayu jelas tidak sah dan berikutan dengan itu adalah terbatal kerana pada masa pemeteraian PJB, perayu tidak berkemampuan di sisi undang-undang untuk menguruskan pegangan tak berbelahbagi di tanah tersebut, di mana, satu-satunya orang yang diiktiraf oleh undang-undang yang mempunyai kapasiti untuk menguruskan pegangan tak berbelahbagi perayu adalah pemegang serah hak. Selanjutnya, kemasukan penghakiman ingkar adalah bertentangan dengan prinsip-prinsip hak asasi kerana pemegang serah hak tidak dijadikan pihak kepada tindakan, begitu juga tidak diserahkan dengan kertas-kertas kausa yang membawa kepada kemasukan penghakiman ingkar meskipun menjadi pihak yang diiktiraf oleh undang-undang sebagai pihak yang betul untuk menguruskan aset perayu, berbangkit daripada statusnya sebagai seorang bankrap.

(4) Seksyen 6(3) Akta Had Masa mengawal tempoh masa di mana pihak yang dikehendaki undang-undang untuk menguatkuasakan penghakiman mahkamah. Apabila perintah mahkamah dibatalkan, maka, satu permohonan untuk mengenepikan boleh dibuat pada bila-bila masa.

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Eu Finance Berhad v. Lim Yoke Foo [1981] 1 LNS 213 FC ***(refd)***
Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***
Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal [2009] 4 CLJ 34 CA ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 2, 6(3)

For the appellants - Yokinee Selvam; M/s Yokinee Selvam
For the respondent - Mahinderjet Singh; M/s Mahinderjit Singh

[Editor's note: For the High Court judgment, please see Causeway Bay Plantations Sdn Bhd v. Tan Hooi Tee & Ors [2012] 1 LNS 474.]

Reported by Shah Saharudin

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] This appeal revolves around a claim for specific performance of an agreement dated 24 August 1995 against 14 defendants with the appellant named as the sixth defendant (the said sale and purchase agreement). The subject matter of the agreement is a piece of land bearing registration particulars Lot No. 6633, Mukim Gunong Semanggol, District of Kerian, Perak (hereinafter referred to as a 'said land'). At all material times, the defendants were represented by the firm of solicitors known as Messrs Toh Theam Hock and Company. The respondent, in turn, was represented by Messrs Peter Huang and Associates. This appeal only concerns the default judgment obtained against the appellant, the claim against the remaining defendants having already been disposed in favour of the defendants by the High Court and the Court of Appeal.

[2] The appellant was adjudged a bankrupt sometime in 1994 on a date even before the execution of the sale and purchase agreement. That the appellant was a bankrupt was made known to the respondent *vide* the letter of Messrs Toh Theam Hock and Company dated 24 June 1994. The appellant obtained a discharge of the receiving and adjudication orders made against him before being adjudicated a bankrupt for a second time in 1995. This fact was again notified to the then solicitors for the respondent *vide* letter dated 1 December 1995. This development caused the defendants to invite the respondent to terminate the sale and purchase agreement. The respondent declined this offer and insisted on enforcing the sale and purchase agreement.

[3] The appellant after discharging himself from the second bankruptcy was made a bankrupt a third time. Again, the bankruptcy status of the appellant was made known to the respondent solicitors *vide* letter of 9 June 1997. The respondent notwithstanding being armed with information concerning the bankruptcy status of the appellant, proceeded to file an action against the defendants in the Taiping High Court. This claim was for the specific performance of the agreement dated 24 August 1995 for the sale of the said land. The 14 defendants including the appellant named in the action filed by the respondent were co-owners of the said land held by them by way of undivided shares.

[4] On 28 June 1999 the respondent obtained default judgment against the appellant notwithstanding that at that time the appellant was not represented by solicitors and the cause papers had not been served on the Official Assignee. Additionally, the appellant had been overseas for some period of time even before the commencement of the action. The claim against the remaining defendants proceeded to trial and was dismissed on the ground that the appellant was a bankrupt. The appeal by the respondent against the decision of the High Court dismissing this action was dismissed by the Court of Appeal and leave to appeal refused by the Federal Court.

Appellant's Case

[5] The appellant's case was primarily that the default judgment was a nullity. The nullity arising from the fact that the appellant was an undischarged bankrupt at the time of the filing of this action, to the knowledge of the respondent, and, yet, no attempt

was made by the respondent to either make the Official Assignee a party to the action or ensure the service of the cause papers on the Official Assignee. Secondly that as the appellant was overseas, a proper application ought to have been made to have the cause papers served on the appellant out of jurisdiction. According to counsel for the appellant, the respondent provided no satisfactory evidence of having served the cause papers on the appellant at all. Finally, that it does not stand to reason for this court to allow the judgment in default against the appellant to remain when the High Court and the Court of Appeal had struck out the respondent's claim against the remaining 13 defendants bearing in mind that the appellant and the 13 defendants are co-owners of the said land in undivided shares. Furthermore, according to counsel for the appellant, the action against the 13 defendants was dismissed primarily because the appellant was an undischarged bankrupt at the time of the execution of the sale and purchase agreement.

Respondent's Case

[6] The respondent obtained default judgment against the appellant on 28 June 1999. This application to set aside the default judgment was filed on 12 January 2012. Against these background facts, learned counsel for the respondent submitted that the application by the appellants was barred by limitation. Section 6(3) of the Limitation Act was cited to us as amounting to an absolute prohibition against the commencement of any proceedings to set aside any judgment on the expiration of 12 years. The case of *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 was cited as authority for this proposition.

Judgment Of The Court

[7] In para. 7 of the affidavit filed in support of the application forming the subject matter of this appeal, it is alleged that the appellant was an undischarged bankrupt at the time of the execution of the sale and purchase agreement by him. This allegation was not denied by the respondent. In paras. 5, 6 and 7 of the affidavit in reply affirmed by one Tan Chong Keat on behalf of the respondent, the respondent did not dispute this fact but merely asserted in reply that the claim was barred by limitation. Similarly, the appellant alleged in para. 4.3 (vi) of the affidavit in reply that neither he nor the Official Assignee were served with the cause papers leading to the entry of default judgment. This

fact was also not denied by the respondent. Furthermore, the documentary evidence before the court reveals that the appellant was adjudicated a bankrupt on 8 January 1992 and remained a bankrupt when he executed the sale and purchase agreement on 24 August 1995. The solicitors for the defendants duly informed the solicitors for the respondent of this fact and drew their lawyer's attention to cl. 17 of the agreement which provided that the sale and purchase agreement was to determine upon any one of the parties to the agreement being adjudicated a bankrupt.

[8] It is trite law that upon a person being adjudicated a bankrupt the estate of the bankrupt vests in the Official Assignee. This court recognised this principle in the case of *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 4 CLJ 34 when it pronounced through the judgment of Low Hop Bing JCA (as he then was) that:

> In an action based on breach of contract by the defendant (as opposed to an action in respect of an injury to the bankrupt's person', the bankrupt's estate and cause of action are vested in the OA upon adjudication and unless the prior sanction of the OA is obtained to maintain the action, the bankrupt is incompetent to do so in his own name or to employ an advocate and solicitor to act on his own behalf without the sanction: *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 444, 446 High Court; *Sabah Bank Bhd*, *supra*, *Tan King Hiang*, *supra*; s. 24(4); s. 48; and *Re Low Kok Tuan*, *supra*;

(See page 44)

[9] In our judgment, the net effect of the estate of the appellant being vested in the Official Assignee at the time of the execution of the sale and purchase agreement is that the agreement is void as the appellant did not have the capacity to deal with his undivided share in the said land by entering into the said sale and purchase agreement. With respect, this explains why both the High Court and the Court of Appeal rejected the claim of the respondent when they sought to enforce the same against the remaining purchasers ie, the defendants.

[10] In our view, the respondent conscious of the invalidity of the sale and purchase agreement and the implications of the aforesaid judgment of the High Court and the Court of Appeal sought to resist this appeal primarily on the ground that since some 12 years have lapsed from the date of the entry of the default judgment, the appellant is precluded by s. 6(3) of the

Limitation Act read with s. 2 of the same Act from applying to set aside the default judgment. With respect, in our view, there is no merit in this submission. In our judgment, the appellant's application to set aside the default judgment should be determined according to the principles of law set out by the Federal Court in the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. As we consider the passage in the judgment Mohd Azmi FCJ (as he then was) to be very pertinent to our judgment, we propose to set out in some detail that part of His Lordship's judgment dealing with the circumstances when a court of law can set aside its own earlier orders on grounds of illegality or lack of jurisdiction:

> It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and void ability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the Court ... "which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasized that the Courts in England have not closed the door as to the type of defects in the final judgment of the Court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:
>
> > The general rule is that where an order is a nullity, an appeal is some what useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached

A in any proceedings, before any court or tribunal and whenever it is relied upon - in other words, it is subject to collateral attack. In collateral proceedings the Court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, 723 Lord Diplock LJ (now a Law Lord) said B (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

C For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of Court *ex debito justitiae* to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory D prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be E exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

F **[11]** In our judgment, the default judgment entered by the respondent against the appellant is clearly illegal and consequently a nullity. We opine to this effect because at the time of the execution of the sale and purchase agreement, the appellant was G incapable in law of dealing with his undivided share in the said land. The only person recognised by law as having the capacity to deal with the appellant's undivided share being the Official Assignee. Quite apart from the appellant being incapable of entering into the sale and purchase agreement, there is also the H question of the entry of the default judgment being against the principles of natural justice, a further ground recognised by Mohd Azmi FCJ as affording a basis for a judgment of the court to be set aside *ex debito justitiae*. We opine to this effect because the Official Assignee was neither made a party to the action nor

I

served with the cause papers leading to the entry of default judgment notwithstanding being the party recognised by law as the proper party to deal with the assets of the appellant arising from his status as a bankrupt.

[12] With respect, we do not consider the principle of law enunciated by the Federal Court in the case of *Perwira Affin Bank Bhd v. Lim Ah Hee* (*supra*) to be an obstacle to our decision. In our judgment, s. 6(3) of the Limitation Act governs the period of time within which a party is required by law to enforce a judgment of the court. The court in the case of *Perwira Affin Bank Bhd v. Lim Ah Hee* (*supra*) was concerned with whether a judgment creditor can claim interest for a period exceeding six years and by way of *obiter* whether a judgment creditor can commence bankruptcy proceeding after 12 years. This appeal concerns the setting aside of an order of court and not the enforcement of the judgment of the court. As regards the setting aside of an order of court, the pronouncements of Justice Abdoolcader (as he then was) in *Eu Finance Berhad v. Lim Yoke Foo* [1981] 1 LNS 213; [1982] 2 MLJ 37 quoted earlier in this judgment is authority for the proposition that where an order of court is nullity, as is the case here, then, an application to set aside can be made at any time. Indeed, Justice Abdoolcader quoting from the decision of Lord Diplock LJ went on to hold that in the case "where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside". Accordingly, the decision of the Federal Court in *Perwira Affin Bank Bhd v. Lim Ah Hee* (*supra*) does not advance the respondent's cause in any manner.

Accordingly, we allowed this appeal. The default judgment obtained by the respondent was set aside. The respondent ordered to pay RM10,000 to the appellant as costs here and below. Deposit refunded to the appellant.